RAJALAKSHMI

v.

LIEW KIM YING & ANOR.

HIGH COURT MALAYA, KUALA LUMPUR
SITI NORMA YAAKOB J
[CIVIL SUIT NO. F 498 OF 1984]
9 NOVEMBER 1987

TRUSTS: *Declaratory order for return of money - Money deposited in 3 fixed deposit accounts in joint names of deceased and defendants - Presumption that defendants held money on resulting trust - Whether presumption rebutted - Whether money outright gift from deceased or donatio mortis causa - When such gifts should accrue - Whether gifts inter vivos or gifts donation mortis causa.*

The sole administratrix of the estate of K. Sathivelu (deceased) the plaintiff prayed for a declaration that the sum of RM80,000 withdrawn by the defendants from 3 fixed deposit accounts, belongs to the estate as the defendants hold the money in trust for the estate.

Held:

[1] By placing the moneys in the joint names of the deceased and the defendants in law the legal title to the moneys in the 3 accounts vested with the deceased and the defendants. On the death of the deceased, it remained with the defendants as the survivors, but since the money was provided by the deceased, there is a rebuttable presumption that the defendants held the moneys upon a resulting trust for the benefit of the deceased's estate.

[2] The fact that all the 3 accounts were opened on an And/Or basis is itself evidence that the deceased intended the defendants to benefit from the accounts and were not a means of creating a trust for himself.

[3] For there to be an effective *donatio mortis causa* 4 conditions need to be fulfilled:

(i) It must be made in contemplation of death.

(ii) It must be made conditional on death.

(iii) There must be delivery of the subject matter of the gift

(iv) The subject matter is capable of passing.

[4] On the evidence, the Court was more than satisfied that the defendants had rebutted the presumption that they held the moneys on trust for the deceased's estate and from this finding, the RM80,000 placed by the deceased in the 3 joint fixed deposit accounts passed to them by way of a *donatio mortis causa*.

[Plaintiff's claim dismissed with costs.]

Cases referred to:

Chow Yee Wah & Anor. v. Choo Ah Pat [1978] 2 MLJ 41
Re Beaumont [1902] 1 Ch 892
Birch & Anor. v. Treasury Solicitor [1950] 2 All ER 1198
In re Craven's Estate [1937] 1 Ch 423

Other source referred to:

Snell's Principles of Equity, 27 Edn., p. 366

For the plaintiff - M.S. Murthi; M/s. Murthi & Partners
For the defendants - Robert Lazar; M/s. Shearn Delamore & Co.

JUDGMENT

Siti Norma Yaakob J:

As the sole administratrix of the estate of her uncle, K. Sathivelu, deceased, the plaintiff prays for a declaration that the sum of RM80,000 withdrawn by the defendants from 3 fixed deposit accounts, belongs to the estate as the defendants hold the money in trust for the estate. Consequential upon the granting of this declaratory order, the plaintiff seeks the return of the money, interest and costs from both the defendants.

The deceased, a bachelor, died intestate, on 29 June 1980, but prior to his death, on 4 July 1979, he sold the only landed property he had together with the house erected on it, No. 14, Jalan 9/5, Petaling Jaya, for a consideration of RM100,000.

Under clause 5 of the sale and purchase agreement, (P5), the deceased was allowed time until 3 July 1984 within which to deliver vacant possession of the house where he had lived until his death, but in the event he should die before that date, the property is deemed to have been delivered to the purchaser at the time of death.

On 17 May 1980, ten days after he had deposited the balance of the purchase price into his banking account at Malayan Banking Berhad in Petaling Jaya, the deceased issued 3 cheques, two in the sum of RM30,000 each and the third for RM20,000. With these 3 cheques he opened 3 fixed deposit accounts in two finance companies, two with CCM and one with Eu Finance Bhd. All 3 accounts had a common factor in that all were opened in the joint names of the deceased with either the 1st or 2nd defendants on the basis of an And/Or account i.e., either one or the other named in the accounts can operate the accounts.

AB2, the fixed deposit receipt for RM30,000 with CCM is in the joint names of the deceased and the 2nd defendant and it is for a period of 3 years with the interest to be paid half yearly and to be accumulated into the account.

The contents of the other fixed deposit with CCM, AB3, are similar to AB2, with the exception that is in the joint names of the 1st defendant and the deceased with the interest to be paid yearly.

The third fixed deposit receipt, AB7 is with Eu Finance Berhad and it is in the joint names of the deceased and the 2nd defendant with an initial deposit of RM20,000 for a period of 1 year.

All these 3 accounts were opened on 17 May 1980 and just over 5 weeks later, on 29 June 1980, the deceased was discovered dead in his house by the 1st defendant. The next day, 30 June 1980, the day of the funeral, the defendants withdrew the 3 sums from the two finance companies.

By placing the moneys in the joint names of the deceased and the defendants, in law the legal title to the moneys in the 3 accounts vested with the deceased and the defendants. On the death of the deceased, it remained with the defendants as the survivors, but since the money was provided by the deceased, there is a rebuttable presumption that the defendants held the moneys upon a resulting trust for the benefit of the deceased's estate. See the case of *Chow Yee Wah & Anor. v. Choo Ah Pat* [1978] 2 MLJ 41.

The defendants seek to rebut this presumption by pleading that the RM80,000 was an outright gift from the deceased or alternatively it was a gift made in contemplation of death i.e. *donatio mortis causa*. To establish this, evidence was held as to the true intention of the deceased when he opened the 3 fixed deposit accounts in the joint names of himself with either of the 2 defendants.

The fact that all 3 accounts were opened on an And/Or basis is itself evidence that the deceased intended the defendants to benefit from the accounts and were not a means of creating a trust for himself.

This intention to give on the part of the deceased is further corroborated by the close relationship the deceased had with the defendants and their family. This dates back to the early 1950's, when the 1st defendant's husband was still alive. Together they formed a partnership and managed a hotel business. After her husband died, the defendants began to rely more on the deceased and likewise the deceased turned to them for assistance rather than members of his own family, namely, the plaintiff's mother who was his sister and his own brother.

When he was warded at Assunta Hospital for his heart attack in 1974, it was the 1st defendant that the deceased had asked for and she had visited and brought him food. Although the plaintiff's house was only 5 minutes walk from his own home, it was the 1st defendant that the deceased had trusted with the keys to his house and she had attended to the needs of the house whilst he was away from the country or away at work in Paloh Estate, Johor. It was also this same house that the deceased had sold to the 1st defendant's daughter and sister of the 2nd defendant and she in turn had allowed him to continue living in the house, rent free, for 5 years after the full purchase price had been settled.

This close relationship can also be found in the letters written by the deceased to the 2nd defendant whom he regarded as a godson, when the 2nd defendant was a student in England. Although the 2nd defendant did not depend on the deceased to see him through his education, nonetheless, the deceased's letters at AC1 - 6 and AD1 - 11, showed him to be very generous. He had sent him pocket money, remembered his birthdays and had even purchased a car for his use.

The plaintiff's brother, PW2, had questioned the authenticity of the letters in AC1- 6 and AD1 - 11 in that they were not written by the deceased as the signatures in them are different from the usual signatures of the deceased in the cheques he had issued. PW2 went to the extent of stating that they had been forged by the defendants but when confronted by the post dates on the original of such letters, he had to admit that it is not possible for the defendants to forge the post marks as they date earlier than 1984, when this suit was filed.

There is no doubt that the deceased's signatures in the letters differ from the ones he appended to formal documents like P5, the sale and purchase agreement and the fixed deposit receipts, AB2, AB3 and AB7.

It is possible that he signed quite differently when he wrote to the defendants whom he regarded as his family and in any event such letters were written from 1973 - 1976, when he could have signed differently from the signatures he eventually adopted in later years. Whatever it is, I have no doubt that the letters were written by the deceased himself as there is no evidence that they have been forged for the purposes of this trial.

However, what is in issue is when such gifts should accrue. If they were to take effect during the deceased's life-time, then they are gifts *inter vivos*, but if made in contemplation of death then they are gifts *donationes mortis causa*.

If indeed the deceased wanted the defendants to benefit from the RM80,000 during his lifetime, he could have easily issued them with 2 cheques, RM30,000 in favour of the 1st defendant and RM50,000 in favour of the 2nd defendant and that would have been the end of the matter as he would have perfected a gift to each of the defendants. Instead, he chose to open 3 joint fixed deposits accounts and the very fact that this was so all point to the conclusion that he had intended that the defendants should benefit after his death.

A *donatio mortis causa* has been defined in the case of *Re Beaumont*, [1902] 1 Ch 892, as

> "being a singular form of gift. It may be said to be of an amphibious nature, being a gift which is neither *inter vivos* nor testamentary. It is an act *inter vivos* by which the donee is to have absolute title to the subject of the gift not at once, but if the donor dies. If the donor dies, the title becomes absolute not under but as against his executor. In order to make the gift valid, it must be made so as to take complete effect on the donor's death".

In short a *donatio mortis causa* has the character of a legacy, by way of contradistinction to a gift *inter vivos*. Because of these peculiar characteristics, the Court when considering such a gift will reject it if in truth what is alleged as a *donatio* is an attempt to make a nuncupative will, or a will in other respects not complying with the forms required by the Wills Act. See the case of *Birch & Another v. Treasury Solicitor* [1950] 2 All ER 1198.

For there to be an effective *donatio mortis causa*, Snell's *Principles of Equity*, 27th Edn., at p. 366 lays down 4 conditions that need to be fulfilled.

1. It must be made in contemplation of death.
2. It must be made conditional on death.
3. There must be delivery of the subject matter of the gift.
4. The subject matter is capable of passing.

The gift must be made in contemplation of death, and in *In re Craven's Estate* [1937] 1 CH. 423, this does not mean "the possibility of death at some time or another, but death within the near future, what may be called death by some reason believed to be impending". Usually, though not necessarily, the gift is made when the donor is very ill and expects to die, but there is no need for the donor to be *in extremis*.

In this case, there was a period of just over 5 weeks between the opening of the 3 fixed deposit accounts and the donor's death and during that period, apart from the oral testimonies of the defendants that the deceased appeared unusually morbid and was talking of death, there is no evidence to suggest that he was very ill. However, he had a history of heart failure as he had suffered a stroke in 1974 but thereafter his health improved until his sudden demise on 29 June 1980, presumably of another massive heart attack. However, a year before that, he decided to sell the only house he ever owned and had also included a proviso to clause 5 of the agreement of sale, P5, that in the event he should die before the expiry of the five year period when he must give up vacant possession, then vacant possession shall be deemed to have been delivered from the date of his death. I consider that the deceased's very unusual conduct in expressing this intention in the agreement can only mean that he was harbouring under the shadow of impending death, no doubt brought about by the one and only stroke he suffered six years earlier, but with his advancing age, he must have foreseen that he would not be able to withstand another attack.

It must not be forgotten that the purchaser of his house was the 1st defendant's daughter and 2nd defendant's sister and it was from the proceeds of this sale that the 3 fixed deposit accounts were opened. All these clearly show that the deceased intended that a part of his assets, should at all costs, go to the defendants and by instructing the 1st defendants that she and her son should redeem the moneys if anything happened to him, all point to the deceased's intention that the gifts were made conditional upon his death.

As the gifts in this case were the 3 fixed deposit accounts, possession of the 3 receipts in itself is proof that there had been a delivery of the subject matter of the gifts. In this respect, there are contradictions in the evidence, as the plaintiff maintains that the receipts had been in possession of the deceased until his death whereas the defendants contend otherwise.

Evidence of this came from PW2, who testified that on 20 June 1980, 9 days before his uncle's death, he had been to see him to invite him to attend his sister's birthday party. Whilst in the deceased's house and unknown to the deceased, he discovered the 3 receipts in a folder kept in an unlocked drawer. On being summoned to the deceased's house on the morning of 29 June 1980, he had checked the same drawer and saw the same folder with the 3 receipts he had seen 9 days earlier. He was able to identify them by the bold prints of the finance companies and by the colour of the receipts but he did not ascertain in whose favour the receipts were made. He only discovered them missing, four days after the funeral.

Both the defendants testified that the receipts had been with them throughout as the deceased had handed the individual receipts to them, the moment the accounts were opened.

I find it rather difficult to accept the picture of a 46 year old man snooping around and going through the private papers of an older relative. Behind PW2's evidence is the suggestion that the defendants had stolen the receipts the day the deceased died but when pressed, he refused to admit that his evidence had that effect.

At the time of the deceased's death, the only 2 persons who knew the details of the accounts were the defendants as even PW2 admitted that he did not bother to read the details in the receipts he saw. If PW2 is to be believed, the 1st defendant had every opportunity to remove them as she was the first person to find the deceased's body on the morning of 29 June 1980. According to PW2, the drawer, in which the receipts were kept was not locked and if indeed, the 1st defendant had the intention of removing the receipts, why wait after the arrival of the deceased's relatives to do so when she had all the house to herself before she summoned them to the house!

If indeed PW2 was all that concerned over the safety of the deceased's personal papers, why return the folder with the receipts back into the unlocked drawer! He is no stranger to the house and if indeed he could not find a safe place for the folder, he could have just handed it to his mother, the deceased's sister, who I am sure would have seen to it that her brother's personal papers were safe.

Again if PW2 is capable of snooping around the deceased's personal papers, I find it rather strange that he did not bother to read the details of the receipts. It only stands to reason that the idea behind his snooping around was to be privy to private information for which he had no business to know.

As for his ability to distinguish the colours of the receipts, that knowledge could easily have been ascertained from his visit to CCM when he called to ascertain the true position of the receipts and the evidence that was led was nothing more than to bolster his claim that he had seen the receipts on the day the deceased died. Admittedly he did not go to Eu Finance personally, but discreet inquiries could easily have produced the required information.

From my appraisal of PW2's evidence, I have no doubt whatsoever that he was lying when he testified that he had seen the receipts twice, the first occasion on 20 June 1980 and the second 9 days later on the morning of the deceased's death. To that extent, I find that the receipts were all along in the possession of the defendants from the time the deceased parted with them when he handed them to the defendants on the day the accounts were opened. As from that date, the moneys no longer remained in the dominion of the deceased and since possession of the receipts is an essential condition before the moneys can be withdrawn, such moneys are therefore capable of passing by *donatio mortis causa*.

On the evidence, I am more than satisfied that the defendants had rebutted the presumption that they held the moneys on trust for the deceased's estate and from this finding, the RM80,000 placed by the deceased in the 3 joint fixed deposit accounts passed to them by way of *donatio mortis causa*. To that end, the plaintiff's claim is dismissed. with costs.

Also found at [1988] 1 CLJ 696